IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 310

IN THE MATTER OF GRANADA APARTMENTS, INC., DEBTOR.

WEIGHTSTILL WOODS, COURT TRUSTEE,
Petitioner,

vs.

CITY NATIONAL BANK AND TRUST COMPANY OF CHICAGO, AND OTHERS,
Respondents.

ANSWER OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI.

VINCENT O'BRIEN,
JOHN MERRILL BAKER,
TRACY WILSON BUCKINGHAM,
Counsel for Respondents.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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ANSWER OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

We submit that the petition for certiorari should be denied for the following reasons:

I.

THE PETITION DOES NOT FOLLOW THE FORM PRESCRIBED BY RULE 38 (2) OF THIS COURT.

The reason for the seemingly harsh penalty of denial of a petition for failure to comply with the requirements of Rule 38(2) is aptly illustrated by the instant case.

The purpose of Rule 38 (2) is to enable the court, with minimum effort, to see what the case is about; that it has jurisdiction to review; what the questions are which the petitioner seeks to have reviewed; and that there are important reasons of the character prescribed in subsection 5 of the same rule for granting review. Failure to comply with the rule defeats its purpose and is apt to result in the hodgepodge here presented, with facts, argument, innuendo, false and unsupported statements, and reasons for granting the writ scrambled to such a degree that a tremendous, but needless burden is placed upon the court and counsel to segregate and to ascertain what the questions are which petitioner would like to have reviewed and the reasons why they should be reviewed.

We submit that the petition does not meet the requirements of Rule 38 (2) and should be denied.

II.

NO SPECIAL AND IMPORTANT REASONS OF THE CHARACTER DESCRIBED IN RULE 38 (5) FOR GRANTING CERTIORARI ARE PRESENTED.

Commencing at page 42 of the petition, the Court Trustee summarizes the reasons upon which he relies for the issuance of the writ. None of the reasons there assigned is of the kind to warrant the acceptance of jurisdiction by this Court unless it be the one contained in the first two paragraphs and amplified and explained at pages 15 to 20 of the petition wherein it is claimed that there was such a departure by the Court of Appeals from the accepted and usual course of judicial proceedings in reference to the record in this case as to call for an exercise of this Court's power of supervision.

In order to thoroughly understand the Court Trustee's

contention and judge of its merit, it will be necessary to correct and amplify his statement as to what transpired.

On May 2, 1939 the trial court made and filed numerous findings of fact and conclusions of law (R. 18)* and entered a decree (R. 3). All matters here involved had been heard by the trial court at one time and were disposed of in that decree. The transcript of evidence relating to the trial was approved by separate order of December 30, 1937 (M. R. 865)† and as will appear from the original thereof now before this Court was certified by the trial judge.

On June 1, 1939 these respondents filed notice of appeal from the findings and the decree (M. R. 796), and a designation of points which, among other things, attacked the materially adverse findings made against them by the trial court (M. R. 799) and thereafter filed a praecipe for a complete record, expressly including the certificate of evidence (M. R. 865).

The Court Trustee, on June 10, 1939, filed his notice of appeal from the same decree (R. 45) and also his designation of points for appeal in which, among other things, he claimed that "the District Court erred in making Findings 56 to 58 contrary to his counterclaim *and the evidence,*" and that "the District Court should have ordered a recovery and judgment against City National as asked for by the counterclaim of the Court Trustee *as shown by the evidence.*"

Having specified as the reason for his appeal the failure of the court to grant him the recovery which the evidence showed him to be entitled to, one would naturally expect his praecipe for record to designate the evidence. And so it did. For the Court Trustee thereafter filed what he

*"R." refers to printed record, Supreme Court No. 310.

†"M. R." refers to the main record, Supreme Court No. 281-282.

called "Praecipe for *Additional* Record" in which he requested the Clerk of the District Court to include "these *additional* matters in the transcript of records and proceedings had in your court, which said City National Bank and Trust Company and others have announced they wish to file in the United States Circuit Court of Appeals for the Seventh Circuit, etc." He then specified the few collateral matters appearing at R. 47. Obviously the intent was that his record should include everything which we had specified and in addition certain other matters.

The Clerk of the District Court, as is contemplated by the Rules of Civil Procedure in the case of two or more appeals from the same decree, prepared one record, which was the only record filed in the office of the Clerk of the United States Circuit Court of Appeals, and certified it to be a true and complete transcript of the proceedings had of record "made in accordance with designations filed in this Court in the cause entitled 'In the Matter of Granada Apartments, Inc., etc.' " (M. R. 816).

Because questions of fee allowances were involved we also appealed from the decree of May 2, 1939 by leave of the Court of Appeals and thereafter by order our two appeals were consolidated, the one record to stand in both (M. R. 920).

We then applied to the Court of Appeals for leave to submit a narrative statement and have it printed in lieu of the full certificate of evidence and asked to be excused from printing certain parts of the remaining record. The motion was granted (M. R. 921).

Printing was then in order. The Clerk of the United States Circuit Court of Appeals printed our full record, save for the omissions so authorized by the Court. But in the Court Trustee's appeal he printed only the findings and the decree of the lower court and the few miscellaneous

items which the Court Trustee had requested in addition to the record which we had designated, thus omitting among other things the evidence on which the findings were based. We therefore moved to consolidate his appeal with ours (R. 121). But the Court Trustee, seeing that the Circuit Court of Appeals with nothing before it except the findings and the decree would have to reverse, objected and took the position that the sole record on his appeal and the one called for by his praecipe was the small printed portion to which we have above referred.

We filed an answer to his contention in this regard in the Circuit Court of Appeals (R. 129-138), to which we particularly call this Court's attention for it contains the full story and completely refutes the point which the Court Trustee there made and which he is reiterating here.

Our motion to consolidate was denied but the Circuit Court of Appeals directed that the original certificate of evidence, which pursuant to order of the District Court had been incorporated in the record from the lower court in lieu of a copy, be incorporated into the Court Trustee's record on his appeal and expressly provided that it need not be printed but that the parties might refer thereto (R. 139). It should be noted that it was not the narrative statement contained in the printed record in our appeals which was thus incorporated into the record on the Court Trustee's appeal, but rather the original unprinted certificate of evidence.

There is no question as to the propriety of the action of the Court of Appeals. The certificate of evidence belonged in the record of the Court Trustee's appeal by virtue of the terms of his praecipe read in conjunction with his designation of points and the praecipe which we had already filed. And if there is any question about that, then at least the praecipe was so ambiguous that any omission on

our part to respecify the evidence was entirely inadvertent, in which case the Circuit Court of Appeals on that showing, or even on its own motion, could supply the evidence under Rules of Civil Procedure 75 (h), which provides that where any material part of the record has been omitted through error or inadvertence it may be supplied either on motion of the parties or on motion of the Court of Appeals itself.

We therefore submit that the Court Trustee's main point is wholly unsupported, and is contrary to the record and to the law. In these circumstances how can it be claimed that the United States Circuit Court of Appeals "so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this court's power of supervision?" We submit that there is nothing else which the Court of Appeals in justice could have done.

As we have said, the other reasons advanced by petitioner for issuance of the writ are not of the character described in Rule 38 (5) of this Court.

There is nothing in the opinion of Judge Major, as claimed by petitioner, to indicate "that the Circuit Court of Appeals reversed and overruled the findings of fact made by the District Court without having analyzed the evidence." On the contrary, the opinion of the Court states:

> "The findings are of such serious character that we have read and re-read them and searched the record with a view of endeavoring to ascertain if they find support. Although the result of this litigation must necessarily depend upon such determination we have received only meager assistance from the Court Trustee. Instead of giving us references to the record which supports the findings the Trustee is content to consume 28 pages of his brief with a verbatim copy of such findings. He then assumes that they are supported and predicates his argument upon such support." (R. 147-148.)

Nor is there any basis for the Court Trustee's claim that the Circuit Court of Appeals in reversing the lower court ignored the law as to the weight to be given the lower court's findings. On the contrary, in concluding that there was no justification for the findings materially adverse to Respondents, the Court said:

> "In reaching this conclusion we are not unmindful of the rule which requires us to accept findings of the trial court supported by substantial evidence." (R. 154.)

It is therefore evident that what the petitioner is really seeking to do is to have this Court read the transcript of the evidence and determine *de novo* whether in its opinion there is sufficient evidence to support the findings notwithstanding that the Circuit Court of Appeals determined that there was not after it had carefully scrutinized the record and applied the correct rule of law as to the weight to be given to the findings. That is not a purpose for which certiorari will be granted. But even if it were the writ would be denied in this case, as the determination of that question would necessitate a review of the evidence and the petitioner has failed to have the transcript of evidence printed in the record for the use of this Court. As an excuse for his failure to do so he says at page 16 of his petition that he has caused it to be sent up under Rule 10(4) of this Court as an original exhibit. But obviously the certificate of evidence is not an exhibit, and an inspection of the Trustee's motion (R. 183) and the order of the Circuit Court of Appeals in respect thereto (R. 185) will disclose that it was not sent to this Court as an original exhibit pursuant to said rule, but as the original transcript of record sent to the Circuit Court of Appeals from the District Court by special order.

The Court Should Not Be Persuaded to Grant Certiorari Merely Because of the Unsupported But Vicious Charges Made Against Respondents.

Inasmuch as there is no substance to petitioner's claims that the Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision and, as petitioner's real intention is to try to induce this Court to accept review for the sole purpose of passing *de novo* upon the evidence with the faint hope that if it did so it might possibly sustain the findings, one might naturally expect that the petitioner would have had the transcript of evidence printed instead of trying to palm it off on the Court in its unprinted form as an original exhibit.

But had the transcript of evidence been printed it would have been available to the Court in usable form and petitioner might have felt constrained to limit his petition to a businesslike attempt to show that the findings were, in fact, supported by the evidence with perhaps appropriate record references to support his statements—a burden which he undoubtedly had.

However, vitriolic vituperation and lambasting of Court not only to expect this Court to accept the findings as the final and uncontestable truth, but has gone far beyond the findings and the record to give his vivid imagination full play in painting a picture of fraud, conspiracy, and double dealing in the hope that by his ranting and vicious attacks he can move this Court to accept review of the entire case.

For instance, the appendices at the end of his petition are no part of the record in the lower court and certainly have no place here. His purpose in inserting them is to

further by innuendo his broad charges of intrigue and machinations which cannot be supported by the record.

However, vitriolic vituperation and lambasting of Court and counsel are not grounds for granting certiorari and we feel confident that in this instance they will fail to accomplish their purpose.

We respectfully submit that the petition should be denied.

VINCENT O'BRIEN,
JOHN MERRILL BAKER,
TRACY W. BUCKINGHAM,
Counsel for Respondents.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO REVIEW AN OPINION BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT UPON APPEAL 7061 FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

COUNTER SUGGESTIONS IN OPPOSITION TO MOTION TO RECONSIDER PETITION FOR CERTIORARI, AND TO REVERSE AND REMAND UPON AUTHORITY OF OPINION NOS. 281-282 FILED FEBRUARY 3, 1941.

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MAY IT PLEASE THE COURT:

Respondents make the following counter-suggestions in opposition to the alleged motion of petitioner for reconsideration of his petition for certiorari heretofore denied:

1. Petitioner's "motion" is, in effect, a petition for rehearing. It was not filed within twenty-five days after

judgment was entered, as required by Rule 33 of this court, since the petition for certiorari was denied November 14, 1940, and the motion was filed March 15, 1941.

2. The 77-B Proceedings were filed in April of 1937. Reorganization was effected and the property turned over to the new company by November 1, 1937. The collateral litigation with these respondents was heard during the year 1937 and was decided July 14, 1938. (R. 761.) The Chandler Act, by its terms, became operative in September of 1938.

3. The question as to whether compensation should be allowed in whole or in part where breach of trust is shown is one to be determined within the discretion of the trial court, whether the proceeding arises under general law or under the provisions of the Chandler Act.

4. As to fees already paid to the Indenture Trustee and to counsel, the District Court resolved the questions now raised by petitioner in favor of Respondents, and having taken cognizance of the fees already paid (R. 764-765) decreed that no *further* fees be paid, claims for further fees to be set off against the counterclaim of Court Trustee. (R. 768.)

Respectfully submitted,

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